No. 14786

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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TOPICAL INDEX

CASES PAGE

SENATE REPORTS

STATUTES

TEXTBOOK

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Jurisdictional Statement.

This is an appeal by appellant, plaintiff below, from an order of the United States District Court for the Southern District of California, Central Division, dismissing the complaint in the Court below for lack of jurisdiction over the subject matter [R. 20]. Appellant alleged jurisdiction in the Court below under the provisions of Section 2201 of Title 28, United States Code [R. 3], and thereafter sought permission to amend the complaint to allege jurisdiction pursuant to the provisions of Section 10 of the Administrative Procedures Act [R. 24].

As the judgment in the Court below was a final decision, this Court has jurisdiction of the appeal pursuant to Section 1291 of Title 28, United States Code.

Statement of the Case.

On April 18, 1955, appellant filed in the Court below a pleading entitled "Complaint for Declaratory Judgment and Injunction" [R. 3], challenging an Order of Deportation dated March 30, 1953, issued by H. R. Landon, appellee's predecessor as District Director of the Immigration and Naturalization Service. The complaint alleges that appellant is to be taken into custody for purposes of deportation; that the Order of Deportation is invalid in that it was issued after a hearing before the Immigration Service in which spurious dictaphone belts were used, in which reasonable cross-examination was denied, and in which the Hearing Officer refused to comply with the administrative regulations pertaining to the conduct of the hearing [R. 8]. Appellant further alleged that a Petition for Habeas Corpus had been filed in the District Court on June 24, 1953; that the Petition was denied on July 28, 1953; that this Court affirmed the judgment on September 7, 1954; that the Supreme Court denied certiorari on January 10, 1955; and that the "Habeas [*sic*] Corpus proceeding was a denial of due process of law," in that the complete immigration file had not been filed with the Court [R. 5, 8].

Appellee Del Guercio, appearing specially for the purpose, moved to dismiss the complaint for lack of jurisdiction over the subject matter, failure to state a claim upon which relief could be granted, and failure to join indispensable parties [R. 12-16]. On May 2, 1955, the District Court (Judge William M. Byrne) granted the motion to dismiss, and judgment was entered on that day [R. 18-20].

As the Motion to Dismiss was heard and decided upon the files and records in the previous habeas corpus pro-

ceedings [R. 13], a brief summary is necessary. The previous action, *Sigurdson v. Landon et al.*, Civil No. 15648-C in the Court below and No. 13974 in this Court, was reported at 215 F. 2d 791. The denial of certiorari is reported at 75 Supreme Court 298. As the petition is quite lengthy, it will suffice to say that the allegations therein are numerous and cover the same ground as the allegations in the complaint in the instant action, other than those dealing with the habeas corpus proceeding itself. In the previous habeas corpus proceeding, the trial Court found:

> "That the Immigration and Naturalization Service that conducted said hearing [the Administrative Hearing which resulted in the warrant of deportation] had jurisdiction to act."
>
> "That the petitioner had notice of the hearing, produced witnesses in her own behalf, and had opportunity to show that she did not come from within the classification of aliens whose deportation Congress has directed."
>
> "That there were no procedural irregularities at said hearing."
>
> "That said administrative hearing was fair."
>
> "That there was substantial evidence to support the warrant of deportation." [Findings IV to VIII; typewritten record in case 13974, p. 89.]

This appeal presents only a single question.

THE SOLE ISSUE BEFORE THIS COURT IS WHETHER A PROSPECTIVE DEPORTEE, HAVING ONCE HAD JUDICIAL REVIEW OF THE DEPORTATION PROCEEDINGS THROUGH THE MEDIUM OF HABEAS CORPUS, CAN THEREAFTER MAINTAIN AN ACTION FOR JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT?

Summary of Argument.

This case is here on appeal from a judgment of the District Court dismissing a complaint seeking review of an administrative order of deportation. This Court properly may take judicial notice of the prior litigation involving this same subject matter. In the prior litigation, this Court affirmed the administrative order of deportation against appellant. *Sigurdson v. Landon* (1954), 215 F. 2d 791. Certiorari was denied. This previous decision in the habeas corpus proceeding conclusively establishes that appellant received a fair hearing and that her deportability was properly determined. It is clear from the record in the habeas corpus proceeding that appellant's renewed contentions with respect to her deportability are entirely without substance.

Appellant, to borrow a phrase from baseball, wants another turn at bat. She seeks to attack the administrative deportation order on grounds previously advanced, and disposed of, in the habeas corpus proceeding; and to challenge the judgment of the trial court in the previous proceeding on grounds disposed of by this Court on the appeal in that case. This latter attack needs no comment. Thus, the present suit is in no sense a new action. Realistically considered, it is an attempt to relitigate issues already disposed of in the prior litigation. Appellant has had a judicial review of the deportation proceedings; she cannot have another.

ARGUMENT.

I.

The Prior Litigation Was the Judicial Review Sought in This Action.

In the appendix hereto, there is reprinted the Memorandum of Decision in the case of *Cruz-Sanchez v. Robinson, et al.,* Civil No. 18785-WB in the United States District Court for the Southern District of California. Although written for a different case, the decision is one of Judge Byrne, the learned trial judge in the court below. The question presented in the *Cruz-Sanchez* case is the same as that presented in this case, and the well-considered opinion of Judge Byrne is respectfully adopted as a part of this brief. As is so well pointed out in Judge Byrne's opinion in *Cruz-Sanchez, the review of deportation orders issued after the effective date of the Immigration and Nationality Act of 1952* is governed by the criteria set forth in Section 242 (b)(4) of that Act (Title 8, U. S. Code, Sec. 1252(b)(4)). It is to be noted that in the instant case the deportation proceedings commenced on October 10, 1951, when a warrant of arrest was issued by the Immigration authorities. Hearings were held and a recommended order of deportation was filed by the Hearing Officer on March 13, 1952. The Acting Assistant Commissioner certified the case to the Board of Immigration Appeals on May 26, 1952. The order of deportation did not become administratively final until March 19, 1953, when the Board dismissed the appeal. At that time, the 1952 Act was in effect.

It may be argued that, since the deportation proceedings were commenced under the prior law and appellant was found deportable on a charge under that law the saving clause (Section 405(a)) of the 1952 Act preserved the prior law. In cases involving the *form* of judicial review (as distinguished from the *scope* of review), it has been held that where final deportation order was entered prior to the effective date of the new Act, the saving clause preserved the old law which precluded non-habeas corpus judicial review.

Heikkila v. Barber, 216 F. 2d 407 (C. A. 9, 1954, concurring opinion of Judge Pope);

Ragni v. Butterfield, 115 F. Supp. 953 (E. D. Mich., 1953).

On the other hand, where, as here, the final order of deportation was not entered until after the 1952 Act took effect, the courts have held that the new Act applied, such that non-habeas corpus judicial review was not precluded.

Shaughnessy v. Pedreiro, 349 U. S. 48 (1955);

Rubinstein v. Brownell, 206 F. 2d 449 (C. A. D. C., 1953), affirmed by an equally divided court, *Brownell v. Rubinstein,* 346 U. S. 929 (1954).

This appellant might as easily have had judicial review in the first instance through other than habeas corpus proceedings.

TURNING FROM THE FORM TO THE SCOPE OF THE JUDICIAL REVIEW, WE FIND THAT APPELLANT HAS ALREADY HAD ALL THE REVIEW TO WHICH SHE MAY BE ENTITLED. THE CASES WHICH HAVE CONSIDERED THE SCOPE OF JUDICIAL REVIEW OF DEPORTATION ORDERS ENTERED AFTER THE 1952 ACT, IN HABEAS CORPUS PROCEEDINGS, HAVE APPLIED THE STANDARDS OF SECTION 242(b)(4).

Navarette-Navarette v. Landon, 223 F. 2d 234, 237 (C. A. 9, 1955);

United States ex rel. Brzovich v. Holton, 222 F. 2d 840, 842 (C. A. 7, 1955).

Surprisingly enough, the saving clause of the 1952 Act was not discussed in those cases, but it is clear that the courts applied the standards found in Section 242(b)(4) of the 1952 Act even if one were to assume that those standards differed in some respect from the standards theretofore applicable. The saving clause continues the old law only "unless otherwise specifically provided" in the new Act. The standards of 242(b)(4) are sufficiently specific to indicate that they are the ones Congress intended to apply.

See:

Marcello v. Bonds, 349 U. S. 302 (1955);

Shomberg v. United States, 348 U. S. 540 (1955).

Moreover, as discussed more fully below, Section 242 (b)(4), in effect when the deportation order here involved was reviewed in habeas corpus proceedings, prescribes substantially the same criteria for both habeas corpus and non-habeas corpus judicial review as were

formerly adhered to when habeas corpus was the exclusive remedy.

The inadequacy of habeas corpus as a vehicle for review of deportation orders inheres in its form rather than in the scope it affords. Since the detention is a jurisdictional prerequisite, the alien ordered deported cannot obtain review of the order in habeas corpus proceedings until he has wound up all of his affairs and has been taken into custody for the purpose of deportation. It is for this reason that habeas corpus has been considered inadequate as a form of review.

See:

United States ex rel. Trinler v. Carusi, 166 F. 2d 457 (C. A. 3, 1948);

Pedeiro v. Shaughnessy, 213 F. 2d 768 (C. A. 2, 1954);

61 Harv. L. Rev. 1445, 1948.

However, once available as a vehicle for review, habeas corpus provides the self-same relief as that afforded by other media and that authorized by Section 10 of the Administrative Procedure Act (5 U. S. C., 1009).

Thus, for example, habeas corpus permits relief where there is an abuse of discretion or failure to exercise discretion:

Mastrapasqua v. Shaughnessy, 180 F. 2d 999 (C. A. 2, 1950);

Accardi v. Shaughnessy, 347 U. S. 260 (1954)

where there has been a failure of procedural due process:

Japanese Immigrant Case, 189 U. S. 86 (1903);
Chew v. Colding, 344 U. S. 590 (1953)

where statutory authority has been misconstrued:

Barber v. Gonzales, 347 U. S. 637 (1954);

Gegiow v. Uhl, 239 U. S. 3 (1915)

where there has been a failure to observe the procedure required by law:

Bridges v. Wixon, 326 U. S. 135 (1945);

Wong Yang Sung v. McGrath, 339 U. S. 33 (1950).

Where the facts are subject to trial *de novo,* as where a substantial claim to citizenship is involved, habeas corpus permits such trial *de novo*:

Ng Fung Ho v. White, 259 U. S. 276 (1922).

The area in which there has been some difficulty in the past concerns assay of the evidence to determine whether it supports the administrative fact findings. Judicial review of a deportation order is limited to a review of administrative record, whether the form of review be habeas corpus or otherwise. Section 10(e) of the Administrative Procedure Act authorized judicial intercession where the agency's findings are unsupported by substantial evidence. Some courts have indicated the scope of inquiry on habeas corpus as somewhat narrower.

See:

Heikkila v. Barber, 345 U. S. 229 (1953).

Although the statutes and regulations preceding the 1952 Act did not define the government's burden of proof in a deportation case, the courts did. While holding that on habeas corpus review of deportation orders, they could not weigh the evidence, the courts ruled uniformly

that a mere scintilla of evidence is not enough. The formulae applied by the courts vary at least in terms.[1] Some of the earlier cases held it sufficient if there were "some" evidence to support the administrative finding.

See:

United States ex rel. Vajtauer v. Commissioner, 272 U. S. 103 (1927).

Later cases have been more exacting. In *Bridges v. Wixon, supra,* the deportation order was set aside because, among other things, it was not based on "probative" evidence, 326 U. S. 135, 152. Other cases, even prior to the 1952 Act, applied the "substantial evidence" test.

Maita v. Haff, 116 F. 2d 337, 338 (C. A. 9, 1940);

Kielema v. Crossman, 103 F. 2d 292, 293 (C. A. 5, 1939);

Daskaloff v. Zurbrick, 103 F. 2d 579 (C. A. 6, 1939);

Morrow v. Tillinghast, 35 F. 2d 183, 184 (C. A. 1, 1929);

Palmer v. Ultimo, 69 F. 2d 1, 2 (C. A. 7, 1934);

United States ex. rel. Schlimmgen v. Jordan, 164 F. 2d 633, 634 (C. A. 7, 1947).

It would thus appear that even before passage of the 1952 Act the courts have required, on habeas corpus

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[1]"Since the precise way in which the courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms." (*Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474, 489 (1951).)

review of deportation orders, the same evidentiary standards as were required in non-habeas corpus judicial review of administrative determinations of other agencies. In framing the evidentiary requirements of Section 242 (b)(4), Congress did not consider that it was setting up new standards. The bills which culminated in the 1952 Act emerged from a detailed and intensive study of our Immigration and Naturalization systems made by the Senate Judiciary Committee, S. Rep. No. 1515, 81 Cong. 2d Sess. (1950). In summarizing the then existing law on judicial review, the Committee stated (p. 629):

> "In a habeas corpus proceeding, based on a deportation case, the Court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation."

As stated earlier, Section 242(b)(4) sets up the criteria applicable to review of all deportation orders entered after the 1952 Act took effect. In such cases, of which this case is one, it matters little whether the form of review is habeas corpus or any other convenient form. As the Court of Appeals for the Seventh Circuit stated in *United States ex rel. Brzovich v. Holton, supra,* at page 841:

> "We think that our scope of review is the same, irrespective of which procedure is employed."

See also, 66 Harvard Law Review 643, 702:

> "It should be pointed out, however, that the scope of review under other forms of relief permitted by the APA is apparently no broader than that which eventually would be available under habeas corpus."

Therefore, it can be seen that appellant here seeks again that which she once has had. The scope of review in this second proceeding would be the same as that had in the previous habeas corpus proceeding. Indeed, the findings of fact in the previous habeas corpus proceeding, while not in the very words of Section 242(b)(4), are unquestionably findings satisfying the criteria set forth therein.[2]

II.

Prior Litigation Conclusively Establishes Appellant's Deportability.

Appellant points out that the doctrine of *res judicata* does not apply to habeas corpus cases. The cited cases involve an existing habeas corpus case, and its relationship to a prior habeas corpus case. They are not applicable because the present cause is not a habeas corpus proceeding, but is rather a declaratory judgment action. The case of *Lapides v. Clark,* 176 F. 2d 619, 85 App. D. C. 101 (1949), cert. denied, 338 U. S. 860, is directly in point. In that case, the plaintiff had instituted habeas

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[2]In the findings, the Court found that the order of deportation was supported by "substantial evidence," rather than the "reasonable, probative and substantial evidence" as stated in Section 242 (b)(4). The words "reasonable" and "probative" add nothing; see footnote 1.

> "A decision of a court, a jury, or an administrative agency, which is unsupported by substantial evidence, is, of course, arbitrary and capricious and may always be set aside on review; but, if the decision has a rational and substantial basis in the evidence and the law, it may not be nullified by a reviewing court, even though that court is of the opinion that it would have reached a different conclusion had it tried the case."
>
> *N. L. R. B. v. Minnesota Mining and Manufacturing Company,* 179 F. 2d 323, 326 (C. A. 8, 1950).

corpus proceedings and the cause had ultimately been determined adversely to him in the Court of Appeals for the Second Circuit. He subsequently brought a declaratory judgment action in the District of Columbia, seeking essentially the same relief. The District Court dismissed the complaint, and was affirmed on appeal. The court said at page 621:

> "In the foregoing case, and in this, there is a virtual identity of parties and allowable issues. The purpose of each was to secure a determination that appellant is a citizen, to the end that he might obtain release from his present detention and be allowed to enter the country as a citizen. Obviously, he could have attacked the constitutionality of the Act in the habeas corpus proceedings. Had he done so, and prevailed, that would have proven a simple and speedy method of accomplishing his objectives. Evidently sensing that *res judicata* might apply, he cites here Collins v. Loisel, 262 U. S. 426, 43 S. Ct. 618, 67 L. Ed. 1062, and Wong Doo v. United States, 265 U. S. 239, 44 S. Ct. 524, 68 L. Ed. 999, as authority for the proposition that the doctrine does not apply as to habeas corpus cases, overlooking the fact that the present action is for a declaratory judgment. We wonder what justification there can be for this additional and needless litigation with all its trouble, expense and delay, which the law so much abhors. [Citing cases.] In view of the granting of the motion to dismiss the complaint, the respondents did not answer. That probably accounts for the fact that the habeas corpus case was not pleaded in bar of the present action. Yet evidence of that case is in the complaint itself. However, in view of the peculiar situation, we do not pass upon the ques-

> tion. Yet, we do think, under the circumstances, that great weight should be given the conclusion of the court in the New York case."

Indeed, the decision of this court in *Heikkila v. Barber,* 216 F. 2d 407 (1954), cert. denied, 349 U. S. 927, is applicable here. Heikkila had originally brought a declaratory judgment action to have an order of deportation declared invalid, and was unsuccessful, *Heikkila v. Barber,* 345 U. S. 229 (1953). A second declaratory judgment action was thereafter filed. This court said at page 409 of 216 F. 2d:

> "Appellant's present suit is in no real sense a new action. It is but a repetition or continuation of the litigation theretofore unsuccessfully urged. We have no alternative but to hold that the earlier decision of the Supreme Court is *res judicata.*"

Here, too, appellant is but attempting to repeat or continue the litigation which she heretofore unsuccessfully waged. Although this is not a second declaratory judgment action, it is clear that declaratory relief, in the usual sense, is not involved in either of appellant's cases. The purpose of the action is to review the administrative fact findings supporting an order of deportation. As was pointed out in the first portion of this argument, the *form* of the action is immaterial. Whatever the form, the prospective deportee receives judicial review, according to the criteria set forth in Section 242(b)(4), of the administrative record.

Conclusion.

By reason of the foregoing, it is respectfully submitted that the order of the District Court dismissing appellant's complaint should be affirmed.

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APPENDIX.

United States District Court, Southern District of California, Central Division.

Received November 17, 1955, U. S. Attorney, Los Angeles, California.

Leonard Cruz-Sanchez, Petitioner, vs. Robert Robinson, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, Merril O'Toole, Regional Commissioner, San Pedro, California, Respondents.

Filed: November 17 1955. Clerk, U. S. District Court, Southern District of California, By....., Deputy Clerk. No. 17875-WB.

Memorandum of Decision.

Cruz-Sanchez filed this action for declaratory judgment seeking the review of a final order of the Immigration and Naturalization Service in which he was found to be a deportable alien and ordered deported from the United States.

The defendants, in their motion to dismiss, concede that an action for declaratory judgment is a proper form of proceeding to obtain judicial review of an order of deportation,[1] but they contend that no relief can be granted here as the claim of the plaintiff has previously been adjudicated, *i. e.,* he has already had his judicial review.

Approximately two months prior to the filing of this action the plaintiff filed a petition for a writ of habeas corpus and was accorded a judicial review of the deporta-

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[1]Shaughnessy v. Pedreiro, 349 U. S. 48.

tion proceedings he attacks in the present suit. Following a hearing on the writ and the return thereto, the court made and filed findings that the hearing and the final order of deportation complied with the conditions and provisions of Section 242(b) of the Immigration and Nationality Act (8 U. S. C. A. 1252(b)) that the deportation proceedings relating to the plaintiff were fair and in accord with his constitutional rights; that there was reasonable, substantial and probative evidence to support the decision of deportability, the order of deportation and the warrant of deportation. Accordingly judgment was entered discharging the writ.

The question here is whether Cruz-Sanchez may have a re-determination of the same issues previously adjudicated. He relies on Shaughnessy v. Pedreiro, 349 U. S. 48, and contends that it authorizes judicial review in both habeas corpus and declaratory relief and therefore he is entitled to *two judicial* reviews of the same administrative proceeding. That is not the holding of the Pedreiro case. The Pedreiro court held "that there is a right of judicial review of deportation orders other than by habeas corpus" and that an action for declaratory relief is an appropriate remedy to obtain such a review. The clear holdings is that judicial review may be had *either* by habeas corpus *or* an action for declaratory relief. The Administrative Procedure Act provides[2] the "form of proceeding for judicial review shall be . . . any

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[2]5 U. S. C. A. 1009(b).

applicable form of legal action (including actions for declaratory judgments or writs for prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction." It could hardly be contended that Congress intended to permit successive judicial reviews of the same administrative action in each of the various forms authorized, with resultant endless litigation and the indefinite postponement of execution of the administrative order. The conclusion is inescapable that Congress intended but one judicial review of administrative action.

Cruz-Sanchez says it is elementary that the doctrine of *res judicata* does not apply to habeas corpus. That is a correct statement of the law[3] which is founded upon the recognition of habeas corpus as the privileged writ of freedom. It is because of this status that courts are not foreclosed from considering successive applications for the extraordinary writ.[4] However, we are not concerned

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[3]Wong Doo v. United States, 265 U. S. 239; Salinger v. Loisel, 265 U. S. 224; Collins v. Loisel, 262 U. S. 426.

[4]To curtail the abuse of the writ, Congress in 1943 adopted Section 2244 of Title 28 U. S. C. A. reading as follows:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." (See Revisor's Note to the effect that the purpose of the section is to prevent suing out successive and repititious writs).

with the application of the doctrine of *res judicata* to habeas corpus proceedings. This is an action for a declaratory judgment and not an application for the Great Writ.

Ordinarily the office of habeas corpus is exhausted when it is ascertained that the agency or court under whose order the petitioner is being held had jurisdiction to act and the requirements of due process were observed.[5] Judicial review of an administrative proceeding may be had in habeas corpus because the Administrative Procedure Act so provides (5 U. S. C. 1099(b)) and the scope of habeas corpus is enlarged accordingly. The scope of judicial review of deportation proceedings wether invoked by habeas corpus or an action for declaratory relief is delineated by section 242(b) of the Immigra and Nationality Act of 1952 (8 U. S. C. 1252(b)). See Marcello v. Bonds, 349 U. S. 302. Section 242(b) sets forth various requirements with respect to notice, right to counsel, right to present evidence and to cross-examine witnesses and provides that decisions of deportability shall be based upon reasonable, substantial and probative evidence. The scope of the review is exactly the same whether the remedy pursued is habeas corpus or an action for declaratory relief.

The plaintiff has been afforded judicial review and a court of competent jurisdiction has determined that the deportation proceedings complied with the conditions and

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[5]Woolsey v. Best, 299 U. S. 1.

provisions of Section 242(b). A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies.[6]

Although the defense of *res judicata* should ordinarily be pleaded; where, as here, the complaint on its face shows the prior proceedings, such defense may be presented by motion to dismiss.[7]

An alien is not entitled to repetitious judicial reviews of deportation proceedings. If discontented with the result of the first judicial review, his remedy is by appeal. The motion to dismiss is granted. Counsel for defendant to prepare, serve and lodge a formal order pursuant to local rule 7.

Dated, Los Angeles, California, November 17, 1955.

WM. M. BYRNE,
United States District Judge.

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[6]Wyoming v. Colorado, 286 U. S. 494; Continental Oil Co. v. Jones, 176 F. 2d 519; Oklahoma v. United States, 155 F. 2d 496; Restatement, Judgments, 568.

[7]Cuff v. United States, 64 F. 2d 624.

Statutes and Regulations and the Statutes Involved.

Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C., Sec. 1252), so far as pertinent hereto, provides:

242. Apprehension and Deportation of Aliens . . .

* * * * * * * * *

Proceedings before a Special Inquiry Officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, the Attorney General shall prescribe. Such regulations shall include requirements that . . .

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.

Section 405 of the Immigration and Nationality Act of 1952 (Footnote, 8 U. S. C., Sec. 1101), so far as pertinent hereto provides:

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect

the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [so in original; probably should read "statuses"], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Section 10 of the Administrative Procedure Act (5 U. S. C., Sec. 1009), so far as pertinent hereto provides:

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.